LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
MAY 3 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 832

EDWARD W. NELSON,

Petitioner,

—v.—

MOORE-McCORMACK LINES, INC.,

Respondent.

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MURRAY GARTNER
Counsel for Petitioner
598 Madison Avenue
New York, New York

INDEX

	PAGE
Summary Reply	1
(1) The District Court held that petitioner was improperly discharged, not that he would have lost his job anyway	2
(2) Neither court below held that the Shipping Commissioner required petitioner to sign a "Government form" in order to get his earned wages	6
Conclusion	9
Additional Appendix	10

Authorities Cited

Cases:

Aird v. United States, 216 F. 2d 149	5
Forster v. Oro Navigation Co., 128 F. Supp. 113, aff'd, 228 F. 2d 319	9
United States Steel Products Co. v. Adams, 13 F. 2d 614, rev'd on other grounds, 275 U. S. 388	5

Statutes:

46 U. S. C. Section 644 First	7
46 U. S. C. Section 651	7

IN THE

Supreme Court of the United States

October Term, 1961

No. 832

EDWARD W. NELSON,

Petitioner,

—v.—

MOORE-McCORMACK LINES, INC.,

Respondent.

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Summary Reply

It is distressing to be charged by counsel so eminent as is Mr. Underwood[1] with lack of frankness before this Court, particularly since the matters which counsel conceives should have been told the Court in the petition not only were *not* relied on by the courts below, but indeed can only be made to appear relevant by distortion of those courts' decisions. A five page Brief in Opposition may be thought to demonstrate physically that no substantial issues are raised. But any such demonstration must fail when, in order to achieve that objective, it is apparently found neces-

[1] Counsel who tried this case for the respondent in the District Court and briefed and argued it in the Court of Appeals are not on the Brief in Opposition.

sary to ignore the issues actually raised by this case, as stated in the petition, and to state fictitious straw issues by attributing to the lower courts decisions which they did not make.

The courts below did not decide, as respondent contends, (1) that petitioner was not entitled to wage damages because he would have lost his job anyway to another radio operator or (2) that petitioner was properly denied payment of his earned wages because he would not "sign the Government form required by the Shipping Commissioner". (Brief in Opposition, p. 4.)

(1) The District Court held that petitioner was improperly discharged, not that he would have lost his job anyway.

What respondent calls "the basic fact", that petitioner's "assignment to respondent's vessel was only temporary" was not made the basis of decision by the District Court for the very good reason that the terms of petitioner's job were fixed by his contract with respondent, the shipping articles which defined the voyage for which he was hired, and not by any purported definition of the job derived from the union assignment slip, which simply made him available to sign those articles (1aa). Moreover, the Union's port agent agreed that even the assignment slip called for the completion of the two foreign voyages for which petitioner was engaged, and he said "I am taking no position as to whether those two foreign voyages terminated. That is for you lawyers" (2aa, 3aa).

That is what the District Court decided—that the second foreign voyage on which petitioner was engaged was terminated in "breach of the articles", that the voyage did not

---

Numbers with suffix (aa) refer to petitioner's additional appendix in the Court of Appeals.

end in the manner specified and required by the articles, and that, therefore, petitioner was improperly discharged.

In that part of the District Court's opinion which holds that there was a breach of contract and then considers the rule of damages applicable to such breach (R. 30a-32a), not a single word suggests that the court was deciding, as respondent puts it, that "since the seaman would have lost his temporary job anyway because of the return of the regular man, the seaman's only damages flowing from the shipowner's termination of the articles at a *wrong place* was the cost of transporting the seaman back to a *right place*." (Brief in Opposition, p. 2.) The District Court said nothing of the kind, and neither did the Court of Appeals, since it did no more than adopt the District Judge's reasoning—discovery of any such ground of decision in either of the opinions below will defy the closest search.

What the District Court did hold, in attempting to distinguish the line of cases cited by petitioner "in which", as that court said "the measure of damages was held to be, *inter alia*, wages until the end of the voyage that continued subsequent to the discharge of the particular seamen" (R. 31a), was that "Wages until the end of the voyage in substance is what was offered and paid" because "the voyage was terminated as to the entire crew" (R. 31a), "in breach of the articles" (R. 30a). In other words, the District Court, in form of words, recognized that the established measure of damages includes wages to the end of the voyage, but by equating "end of voyage in accordance with the articles" with "end of voyage in breach of the articles" denied to petitioner the wage damages to which he was entitled because of his unlawful discharge. Peti-

---

Nor does the decision rest in any way on the fact that there was a "death in the family" of the other radio operator (Brief in Opposition, p. 1) or that petitioner was a law student as well as a radio operator (Brief in Opposition, p. 2).

tioner need add nothing here to what he said at pages 11-13 of the petition; but respondent, apparently unable to respond to those reasons for granting the writ, has chosen to argue that this Court should not review a decision which neither the District Court nor the Court of Appeals made.

The findings which respondent recites to support its own conclusion that "the seaman would have lost his temporary job anyway because of the return of the regular man", namely that "libelant was . . . cleared by his union for a coastwise trip lasting from October 25th to November 13, 1955" and that "On November 14th the regular radio man had returned and new articles were to be opened that day for a foreign voyage" (Brief in Opposition, pp. 1-2), were not relied on by the District Court as any basis for its decision, and certainly not adverted to in any way by the Court of Appeals. The first finding was specifically challenged on appeal, because there is not a suggestion of any evidence in the record to support it (Libelant-Appellant's Reply Brief in the Court of Appeals, p. 4), and the Court of Appeals makes no reference to it.

The second finding is used by respondent—not by the District Court or the Court of Appeals—to imply that petitioner would have lost his job anyway because of the return of the other radio man. But even under the assignment rules of his union—let alone the fact that it was the shipping articles which controlled the terms of the job—that radio operator could not claim the job unless he returned to the ship at the port where he left it: San Francisco, not New York (2aa).

Once again, it is sheer fantasy for respondent to suggest that the courts below in any way held that the *quantum* of petitioner's damages was to be reduced to nothing, in respect of wages for the remainder of nine months, the District Court having found that "the ship did not sooner

return to the west coast" (R. 28a), because he would have lost his job anyway; what those courts held was that the *measure* of damages did not include wages for the period during which the voyage specified by the articles would have continued. In simple fact, the courts below have held that although shipping articles specify that a voyage shall continue for nine months unless sooner terminated by final discharge on the west coast of the United States, a shipowner may terminate such a voyage at any port in the world and be liable to seamen thus unlawfully discharged for nothing but transportation to the west coast.[1] This is not a decision on the *quantum* of damages, but on the *measure* of damages: transportation alone, as against, and in conflict with, "basic wages and overtime and 'found' *as well as* transportation" (Emphasis added), *Aird v. United States*, 216 F. 2d 149, 150 (3rd Cir. 1954), or to the same effect, "stipulated wages for the entire voyage *and* the amount of expenses in returning to the port of discharge" (Emphasis added), *United States Steel Products Co. v. Adams*, 13 F. 2d 614 (5th Cir. 1926), *rev'd on other grounds*, 275 U.S. 388, (1928).

There is, in respondent's Brief in Opposition, the most extraordinary repeated reliance on a ground not even stated by the District Court, and certainly not made the basis of its decision by the Court of Appeals—that "petitioner loses no wages because he would have had to give up his job to

[1] To use respondent's phrase, it is "lacking in frankness"—to quote the District Court's statement that "Libelant does not dispute the right of the vessel to terminate the voyage prior to the expiration of the outside time limitation" without making it clear that the District Judge and the parties below understood that petitioner's position is that such a right of prior termination exists only when the vessel is in a permissible port of final discharge, and not when the vessel is in a wrong port. It is precisely because the vessel's return to a proper port is a condition precedent to the existence of a right of prior termination that the District Court held that respondent had breached the articles.

the regular man in any event" (p. 3)—to justify the assertion that the issue is only one of *quantum* of damages. The issue plainly and inescapably, *on the decisions and judgments below*, is whether a seaman is entitled to wages for the unexpired portion of a voyage improperly terminated in breach of articles, as well as transportation to the port of origin, as prior cases in the Second Circuit and cases in the Third and Fifth Circuits have uniformly held, or only to transportation, as the Court of Appeals in this case held.

(2) Neither court below held that the Shipping Commissioner required petitioner to sign a "Government form" in order to get his earned wages.

Under the guise of once again accusing petitioner of lack of frankness, respondent has managed to pack so much confusion in the last page and a half of its Brief in Opposition that it can only be clarified item by item:[1]

a. That the so-called "Government form of 'mutual' release" was mutual if signed by both parties does not detract from the fact that it was a general release as to all claims arising from the voyage. All one has to do is to look at the mutual release to which respondent refers (R. 17a) to see that it *is* such a general release, and to see also that it heads the sign-off page of the shipping articles. It is not a "Government form" in the sense that the Government requires it to be signed; respondent does not, and cannot, cite any law which requires a seaman to sign it.

b. The Shipping Commissioner does not require "the master, as well as the seamen, to sign [the form] before payment of wages." No record reference is given to

[1] All following quotations not otherwise identified are from the Brief in Opposition, pp. 4-5.

this statement, which cannot stand in the face of 46 U. S. C. 644 First.* That statute permits, but does not require, the execution of a mutual release at the time wages are paid, if both master and seaman agree to the settlement, or if, pursuant to 46 U. S. C. 651, any controversy between them has been submitted in writing to the Coast Guard official and the settlement "adjusted by such Coast Guard official." Obviously here no settlement was agreed, nor was the controversy submitted for adjustment.

c. The quotation from the District Court's opinion on page 4 of the Brief in Opposition is completely at odds with the quotation from the Court of Appeals on page 5. The District Court found, contrary to *all* the evidence "that the mutual release that respondent required was the form that the Shipping Commissioner made seamen sign in the event they did not sign off of the articles themselves" (R. 33a). There is no such form. The Shipping Commissioner testified that the form was "routinely used *after a man signed off articles* at the shipping commissioner's office" (Emphasis added) (R. 16a), and respondent's paymaster also testified that what the respondent required was "an indication from the Shipping Commissioner that they have *signed the articles*" (Emphasis added) (R. 16a). And signing off the articles, or signing the articles means signing the release on the sign-off page (R. 17a).

d. The Court of Appeals avoided the embarrassment of pointing out the District Court's error in finding that respondent asked petitioner to sign a form which did not exist and which no one had testified existed, by holding succinctly that "Appellee was justified in refusing to pay so long as appellant refused

*The statute is set out in the additional appendix annexed hereto.

to sign the customary mutual release." But that court in that sentence is referring to the only mutual release which ever was in the case, namely that on the sign-off page of the articles (R. 17a), as to which there is absolutely no finding by the District Court that its signing was "customary" when there was a dispute between master and seaman. On the contrary, the District Court found that the Shipping Commissioner made seamen sign a non-existent form (presumably "customarily" because it was a form) "in the event they did not sign off on the articles themselves" (R. 33a).

e. Far from holding "that petitioner's wages were always available to him if he would sign the Government form required by the Shipping Commissioner 'under protest'" (Brief in Opposition, p. 4), the District Court made it clear that it was the *respondent* who required that petitioner sign a mutual release. Of course, the District Court mistakenly said that "Libelant had refused to sign off on the articles *or* to sign the requested release" (R. 33a) (Emphasis added), since there was no release proferred other than that on the sign-off page. And it was this mistaken belief that there were two kinds of releases which led the District Court to say that "the mutual release that respondent required was the form that the shipping commissioner made seamen sign in the event they did not sign off on the articles themselves," when that form was only a certificate by the Commissioner *to* the shipowner attesting that a seaman *had* signed off the articles.

f. Non-payment of earned wages here when due *was* arbitrary, since it is undisputed that petitioner offered a receipt, and respondent insisted on something other than a receipt. Surely, the District Court's finding that petitioner would not sign a non-existent form can-

not justify respondent's failure to pay. And it is equally difficult to understand the Court of Appeals' holding that it is a "customary and reasonable requirement" before payment of a seaman's earned wages as commanded by statute, to compel the seaman to sign a release "under protest," which notation by hypothesis nullifies the effect of the release as a release.

Neither can this decision, imposing a condition on tender of wages "other than the signing of a receipt for money received", *Forster v. Oro Navigation Co.*, 128 F. Supp. 113 (S. D. N. Y. 1954), aff'd, 228 F. 2d 319 (2nd Cir. 1955), be reconciled with the decisions of the Fourth Circuit cited at page 14 of the petition.

Conclusion

Respondent's failure to answer the petition except by asserting that the court below decided something else, has made this reply brief necessary to demonstrate that respondent is discussing a hypothetical decision, not the one which requires review by this Court.

Relying upon what the court below held, not on what respondent says it held, petitioner respectfully submits that the petition clearly shows that the decision below, on both the question of measure of damages for breach of shipping articles, and the question of penalty wages for inexcusable failure to pay seaman's wages when due, is in conflict with decisions of this Court and with decisions of other circuits. Both questions are of basic importance in maritime law; the petition therefore should be granted.

Respectfully submitted,

MURRAY GARTNER
Counsel for Petitioner

Dated: New York, N. Y.
May 2, 1962.

ADDITIONAL APPENDIX

46 U. S. C., Section 644 First, provides:

"The following rules shall be observed with respect to the settlement of wages:

"First: Upon the completion before a Coast Guard official to whom the duties of shipping commissioner have been delegated, of any discharge and settlement, the master or owner and each seaman, respectively, in the presence of such Coast Guard official, shall sign a mutual release of all claims for wages in respect of the past voyage or engagement, and such Coast Guard official shall also sign and attest it, and shall retain it in a book to be kept for that purpose, provided both the master and seamen assent to such settlement, or the settlement has been adjusted by such Coast Guard official."